The U.S. Supreme Court's "Disability" in Statutory Construction: The Debate Over the Interpretation of the Definition of "Disability" Under the Americans with Disabilities Act (ADA) & the ADA Amendments Act of 2008

Laura C. Hoffman

Published Article Citation: Laura C. Hoffman, *The U.S. Supreme Court's "Disability" in Statutory Construction: The Debate Over the Interpretation of the Definition of "Disability" Under the Americans with Disabilities Act (ADA) & the ADA Amendments Act of 2008*, 14 Scholar 913 (2012).

ARTICLES

THE U.S. SUPREME COURT'S "DISABILITY" IN STATUTORY CONSTRUCTION: THE DEBATE OVER THE INTERPRETATION OF THE DEFINITION OF "DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) & THE ADA AMENDMENTS ACT OF 2008

LAURA C. HOFFMAN, ESQ.*

* Laura C. Hoffman, Esq. is a candidate for a S.J.D. from Loyola University Chicago School of Law's Beazley Institute of Health Law and Policy. She earned an L.L.M. in Child and Family Law from Loyola University Chicago School of Law in 2010. She holds a second LL.M. in Government and Law with a concentration in Civil and Constitutional Rights from American University Washington College of Law, 2009. Laura earned her J.D. from Ave Maria School of Law in 2007. She holds a B.A. in Political Science, cum laude, from the University of Notre Dame, '04. She would like to thank her professional mentors, Professor Diane Geraghty, Professor John Blum, and Professor Michael Zimmer, for their continued support and encouragement of her legal scholarship and pursuit of a teaching career. Finally, she leaves a special thank you to her parents, Ronald and Janet Hoffman, and Robert L. Choromanski, Esq. for their gifts of unconditional love. She may be reached directly at lhoffman@luc.edu.

I. Introduction

When Congress passed and President George Bush signed the Americans with Disabilities Act (ADA) in 1990,[1] millions of Americans with disabilities celebrated what appeared to be a monumental change in the protection of their civil rights.[2] But challenges to the law quickly arose that required U.S. courts, and finally, the U.S. Supreme Court, to provide essential interpretations of the terms of this landmark legislation. Supporters of the 1990 law believed that the early controversial decisions by the U.S. Supreme Court severely constricted the broad protections Congress intended to provide to individuals with disabilities through the ADA.[3] Discontentment with these judicial interpretations led to an effort by members of Congress to pass the ADA Amendments Act of 2008

1. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990). The Americans with Disabilities Act's stated purpose is as follows:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities;
> (4) and to invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id. § 2(b), 104 Stat. at 329.

2. In 1990, President George H.W. Bush signed the ADA, stating that "[w]ith today's signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom." 154 Cong. Rec. H.6066 (daily ed. June 25, 2008) (statement of Rep. Hoyer (D-Md.) quoting President George H.W. Bush on the floor of the House during debate over the ADA Amendments Act of 2008).

3. *See* Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 Ind. L. J. 187, 198-99 (2010) (arguing that the Supreme Court constricted the ADA through its decisions, and overlooked Congress's original intentions).

(ADAAA).[4] These amendments passed with substantial bipartisan support and were signed into law by President George W. Bush.[5]

In his vigorous dissenting opinion in *Sutton v. United Air Lines, Inc.*,[6] Justice John Paul Stevens gave voice to members of the disability community's widespread dissatisfaction with the Supreme Court's restricted approach to the statute.[7] Justice Stevens argued that the Court's restrictive interpretation of the term "substantially limits" was in direct contradiction to the law's fundamental purpose of ending discrimination against people with disabilities.[8] The mounting criticism of the Supreme Court's interpretative straightjacket now had a specific theoretical framework.

Part II of this Article provides an overview of the contrasting textual interpretations offered by the Court related to the definition of "disability" in the original ADA. Next, it reviews the purposes and findings of the ADA Amendments Act of 2008 that examine the conflict that arose over the correct original interpretation of the ADA. Third, this Article provides critical analysis of the Supreme Court's problematic interpretations including: (1) its interpretation of Congress's ambiguous language in the text of the original; (2) the Court's disdain for the legislative history of the ADA including congressional reports and selective use of these instruments when deciding issues of statutory construction; and (3) the Court's potential error in judgment of relying on federal agency guidelines for interpretations of the language of the original ADA when no agency had been granted interpretative authority over the ADA.

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4. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, §§ 2(a)(4)–(a)(7), 122 Stat. 3553, 3553.

5. President George W. Bush signed the ADA Amendments Act of 2008 on September 25, 2008. Press Release, Office of the Press Secretary, President Bush Signs S. 3406 into Law (Sept. 25, 2008) (available at 2008 WL 4359444). The President and the CEO of the American Association of People with Disabilities, Andrew Imparato, remarked on the signing of the Act:

> Today President Bush has followed in his father's footsteps and taken a stand for equal opportunity and full participation for all Americans. I deeply appreciate the bipartisan leadership in the Congress that brought us to this point, and I thank President Bush for his leadership in signing this critical civil rights law that will make a real difference in the lives of millions of Americans with disabilities and chronic health conditions . . . .

AAPD Applauds President Bush for Signing ADA Amendments Act into Law, PRNEWSWIRE, Sept. 25, 2008, *available at* http://www.disabilityrightsmt.org/janda/articles/UploadFile/1222370802_AAPD%20Applaudes%20President.pdf.

6. 527 U.S. 471 (1999).

7. Sutton v. United Air Lines, Inc., 527 U.S. 471, 495 (1999) (Stevens, J., dissenting).

8. *Id.* at 502–03. Justice Stevens opined that "[t]he Act generally protects individuals who have 'correctable' substantially limiting impairments from unjustified employment discrimination on the basis of those impairments." *Id.*

Part IV then considers what legal developments have occurred since the passage of the ADAAA and what this means for the interpretation of "disability." Finally, this Article concludes with a brief commentary on the relationship between the Supreme Court and Congress, how the dynamic between the branches can both hinder and advance public policy, and how a new interpretation of disability could impact disability law, particularly in looking at obesity as a disability.

II. The Original ADA "Disability"

Due to its lack of precision the term "disability," as defined by Congress in the original ADA, arguably left open room for interpretation by the courts. The ADA originally defined disability in the following manner:

> The term "disability" means, with respect to an individual—
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[9]

In *Bragdon v. Abbott*,[10] the Supreme Court recognized this definition of "disability" as having originated "almost verbatim from the definition of 'handicapped individual'" in Section 504 of the Rehabilitation Act of 1973 "and the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988 . . . ."[11] The assumption could be made from this analysis that the Supreme Court would interpret the language in the ADA parallel to that of the Rehabilitation Act. The Court conceivably could have been establishing an interpretative pattern for its jurisprudence in the area of civil rights discrimination based on disability in federal law. Eventually, to the dismay of many members of Congress, disability advocates, and individuals with disabilities, the Supreme Court would go on to prove that was not the case as the Court's involvement in the ADA's interpretation increased.

A. *Supreme Strictness of "Substantially Limits"*

In writing the ADA, Congress was silent on defining the term "substantially limits." The significance of the meaning of "substantially limits" is that an individual's ability to qualify as disabled under the ADA is dependent on the interpretation of this term included within the definition of

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9. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 329–30.

10. 524 U.S. 624 (1998).

11. Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

"disability."[12] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[13] the Court provided a specific interpretation of "substantially limits."[14] The Court stated, "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[15] The Court in *Toyota* also made a distinction in this definition involving the relationship between the impairment and the degree of interference it causes in performing a major life activity.[16] "The word 'substantial' thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities."[17] This interpretation of "substantially limits" in *Toyota* was constructed largely on the basis of affirming the Court's precedent on the impact of impairment on working.[18] The *Toyota* Court determined that an individual would need to be substantially limited in another daily life activity besides working to qualify as having a disability under the ADA.[19] The Court articulated this strict standard as follows:

> When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. Otherwise, *Sutton*'s restriction on claims of disability based on a substantial limitation in working will be rendered meaningless because an inability to perform a specific job always can be recast as an inability to perform a "class" of tasks associated with that specific job.[20]

There is no textual evidence in the ADA to support this view in light of congressional silence. Contrary to this interpretation, the ADA also could have been read to qualify an individual as having a disability because of an impairment that substantially limits the individual's ability to work as a major life activity.

The path the Court took to arrive at this definition and fill the congressional silence relied heavily on agency guidelines. In reaching this defini-

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12. ADA § 3(2)(A).
13. 534 U.S. 184 (2002)
14. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196–97 (2002).
15. *Id.* at 198.
16. *Id.* at 196–97.
17. *Id.* at 197.
18. *Id.* at 199–200.
19. *Toyota Motor Mfg.*, 534 U.S. at 200–01.
20. *Id.*

tion of "substantially limits" in *Toyota*, the Court identified two sources of guidance for interpretation: (1) the regulations interpreting the Rehabilitation Act of 1973; and (2) EEOC regulations for interpretation of the ADA.[21] The Court also acknowledged Congress's use of language in the ADA, which is identical to that of the Rehabilitation Act of 1973, suggesting construction "in accordance with the pre-existing regulatory interpretations" of the Rehabilitation Act.[22] The existence of the EEOC regulations that define "disability" were referred to as persuasive authority by the Court despite the lack of interpretative authority given to any agency over the ADA.[23] The Court here noted that although both parties found the regulations of the EEOC "reasonable," there was no way to determine how much deference these definitions should be given.[24] This response by the Court seems valid as compared to the Court's discussion of the regulations for the Rehabilitation Act. Regulations for the Rehabilitation Act were issued in 1977 by the Department of Health, Education, and Welfare (HEW).[25] HEW was given enforcement and implementation authority of the Rehabilitation Act of 1973.[26] At that time, HEW never defined "substantially limits" while the Court went on to cite the EEOC definition of "substantially limited" despite its limited "persuasive" authority.[27] As the Court then proceeded to fill in the empty gaps of terms within the definition of "disability," it looked to *Webster's Third New International Dictionary* and the *Oxford English Dictionary* for its definitions of "substantially limits" in conjunction with the EEOC regulation's definition of the word.[28]

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21. *Id.* at 193.

22. *Id.* at 194.

23. *Id.*

24. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 194 (2002).

25. Justice O'Conner in delivering the decision of the Court wrote:

> The Rehabilitation Act regulations issued by the Department of Health, Education, and Welfare (HEW) in 1977, which appear without change in the current regulations issued by the Department of Health and Human Services, define "physical impairment," the type of impairment relevant to this case, to mean "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine.

Id. at 194 (citing 45 CFR § 84.3(j)(2)(i) (2001)).

26. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 3, 87 Stat. 355, 357–58; *Toyota Motor Mfg.*, 534 U.S. at 195.

27. *See Toyota Motor Mfg.*, 534 U.S. at 193–94 (interpreting "Congress'[s] repetition of a well-established term" as congressional intention of construction "in accordance with pre-existing regulatory interpretations" as contrasted with the "less clear" "persuasive authority of the EEOC regulations").

28. *Id.* at 196–97.

Another critical point in reviewing the Court's analysis is the heavy weight that was given to agency regulations over the minimal consideration of the ADA's legislative intent. The only reference the Court made to the legislative intent for the ADA was shown by a statistic representing the number of people Congress listed as having disabilities.[29] The Court's evaluation of that number, as its sole reflection on the legislative intent, combined with the EEOC regulation was the basis for creating a stringent standard for "substantially limits" under the ADA:

> That these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA, which lays out the legislative findings and purposes that motivate the Act. When it enacted the ADA in 1990, Congress found that "some [forty-three million] Americans have one or more physical or mental disabilities." If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher.[30]

The Court's restrictive interpretation of "substantially limits" demonstrates several potential problems in its statutory construction. First, the Court may very well have gone outside Congress's view of "substantially limits" by finding working, in and of itself, to be insufficient for its meaning. The Court then continued to draw a strict line on the definition from that premise. Second, the Court's reliance on agency regulations for interpreting the ADA when no agency has been given authority for its interpretation is questionable.[31] Finally, the Court's disregard for the legislative intent through its intense scrutiny of a single aspect of that intent begs the question whether the Court should be probing into such deep inquiry rather than taking the intent at face value.

B. *Filling in the Gaps for "Major Life Activities"*

Another area where congressional silence left room for interpretation in the definition of "disability" was lack of guidance for what constitutes "major life activities." Again, the Court in *Toyota* was called upon to replace this silence with meaning.[32] As the Court had previously done

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29. *Id.* at 197.

30. *Id.* (internal citations omitted).

31. *See id.* at 194 ("Because both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due.").

32. *Toyota Motor Mfg.*, 534 U.S. at 197 (defining "major" in order to interpret "major life activities" under the ADA).

with the term "substantially limits," it referred to the *Webster's Third New International Dictionary* to provide an initial understanding for "major."[33] The Court used this reference in order to define "major" as important.[34] From this meaning, the Court proceeded to define "major life activities" in the following manner, "'Major life activities' thus refers to those activities that are of central importance to daily life."[35]

C. *The Use of "Mitigating Measures" to Disqualify Disability*

The analysis used by the Court to decide whether or not an individual has a disability included a consideration of whether or not the individual could use assistive technology or accommodations to lessen the impact of the individual's disability.[36] In *Sutton*, the Court made a blatant statement of its unwillingness to even consider legislative history in determining whether or not corrective or mitigating measures should be taken into account to determine whether or not a person qualifies as having a disability:

> We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act. Justice Stevens relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.[37]

Clearly this highlights the disagreement within the Court itself of the role and impact that Congress's purposes for enactment of the ADA should have on its interpretation. The Court continued its analysis by explaining its approach to the inclusion of "corrective measures" in the determination of disability.[38] The Court's understanding of "corrective measures" comes from looking at several words together in context: "dis-

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33. *Id.*
34. *Id.*
35. *Id.*
36. Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999).
37. *Id.* (internal citations omitted).
38. *Id.* at 481.

ability," "substantially limits," and "major life activities."[39] The Court described this analysis as follows:

> Because the phrase "substantially limits" appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited in order to demonstrate a disability. A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently "substantially limits" a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not "substantially limi[t]" a major life activity.[40]

The Court engaged in what appears to be an interesting word play to lead it to the conclusion that someone utilizing "corrective measures" really has no disability at all. The view the Court adopted is that because such corrections are available, the person with a disability who uses these measures loses his or her categorization as disabled under the ADA.[41] This is problematic as the Court creates a misleading, and in many cases false impression, that the disability magically vanishes or is eliminated. The Court instead views a disability in these circumstances as being "potential" or "hypothetical" when the reality is that with or without the availability of the correction, the individual would still live with a disability.

The Court's analysis then continued by examining the definition of disability and the recognition that this evaluation always requires an "individualized inquiry."[42] The Court claimed that in order for the notion of "individualized inquiry" to operate appropriately, the guidelines that have been created as an attempt to provide interpretation of the ADA's language cannot be correct.[43] The Court articulated this view below:

> The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often require courts and employers to speculate about a person's

39. *Id.* at 482-83.

40. *Id.*

41. *See Sutton,* 527 U.S. at 483, 486 (reasoning that the use of such corrective measures renders the impairment "corrected," and thus is no longer substantially limiting).

42. *Id.* at 483.

43. *Id.*

> condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition.[44]

This leads to the conclusion that the use of the guidelines would result in evaluating based on a group with similar disabilities rather than an individual inquiry of disability.[45] According to the Supreme Court, "[t]his is contrary to both the letter and the spirit of the ADA."[46]

Like in the *Toyota* case, the Court also focused on the number of individuals with disabilities identified by Congress in the "findings" section of the original ADA.[47] The Court suggested that the approach of pinpointing the number at "[forty-three] million" provided insight as to whether or not individuals with disabilities using "corrective measures" were to be included in the framework of ADA's protections.[48] The Court stated:

> Regardless of its exact source, however, the [forty-three] million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not "disabled" within the meaning of the ADA. The estimate is consistent with the numbers produced by studies performed during this same time period that took a similar functional approach to determining disability.[49]

Furthermore, the Court rationalized that if in fact Congress intended to be inclusive of those using mitigating measures as qualified individuals with disabilities, they would have accounted for this in the number estimate:

> Because it is included in the ADA's text, the finding that [forty-three] million individuals are disabled gives content to the ADA's terms, specifically the term "disability." Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evi-

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44. *Id.*

45. *See id.* at 483–84 (noting the Court's dissatisfaction with the guidelines approach to determining whether an individual is disabled or not).

46. Sutton v. United Air Lines, Inc., 527 U.S. 471, 484 (1999).

47. *See id.* (noting the Congressional findings indicate lack of congressional intent for ADA coverage for those whose uncorrected conditions resulted in disabilities); *see also* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002) (confirming the importance of using strict interpretation to form a standard for qualifying as disabled as reflected in the legislative findings and purposes behind the act).

48. *Sutton*, 527 U.S. at 486.

49. *Id.*

dence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.[50]

III. Findings and Purpose of the ADA Amendments Act of 2008

Under the "Findings and Purposes" sections of the ADA Amendments Act of 2008, Congress reiterated its intent for originally enacting the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and to "provide broad coverage."[51] The "Findings" section emphasized that the passage of the ADA was meant to ensure the protection of the human dignity of individuals with disabilities regardless of the nature of the mental or physical limitations recognizing that a disability "in no way diminishes a person's right to fully participate in all aspects of society."[52] Congress stressed that the necessity for the inclusion of people with disabilities in this way requires the elimination of remaining "societal and institutional barriers" as well as "prejudice" and "antiquated attitudes."[53]

Congress then admitted that it made the assumption that courts would interpret "disability" under the ADA identically to the Rehabilitation Act of 1973.[54] Furthermore, this acknowledgment was accompanied by the reality of the situation—left to the discretion of the courts, the definition of "disability" has been interpreted contrary to congressional intent.[55] Congress cited problematic U.S. Supreme Court precedent that has largely contributed to the misinterpretation of the definition of "disability" under the ADA in courts across the nation.[56] Specifically, Congress pointed to the interpretation of the term "substantially limits" by the Court in *Toyota* as well as the EEOC's guidelines that have created a much more stringent standard than was intended.[57]

Interestingly, the outlined purposes of the ADA Amendments Act of 2008 established a formal rejection of previous Court precedent based on

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50. *Id.* at 487.

51. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3553.

52. *Id.* § 2(a)(2).

53. *Id.*

54. *Id.* § 2(a)(3).

55. *Id.* (finding that "Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled").

56. ADAA § 2(a)(4)–(5), (7).

57. *Id.* § 2(a)(7).

statutory construction and interpretation.[58] Congress specifically rejected the Court's statutory construction in *Sutton* that permits lower courts to consider "ameliorative effects of mitigating circumstances" in order to make a determination of whether or not an individual qualifies as having a disability.[59] Additionally, Congress expressed its rejection of the Court's interpretation of disability coverage in *Sutton*, instead noting its preference for the Court's analysis in *School Board of Nassau County v. Arline*[60] in evaluating disabilities under Section 504 of the Rehabilitation Act.[61] In *Toyota*, the Court's strict interpretation of "substantial" and "major" in defining "disability" significantly narrowed the ADA's protections of who qualifies as disabled.[62] Congress rejected this interpretation.[63] Congress also rejected the Court's extensive analysis in *Toyota* as to whether an individual qualifies, because instead Congress intended to place the focus of analysis in ADA cases on "whether entities covered under the ADA have complied with their obligations."[64]

These opening sections of the ADA Amendments Act of 2008 show that either the Court placed minimal value on the legislative intent for the ADA or that the Court properly interpreted the ADA as drafted because of congressional error that left interpretation open to the courts. In order to examine these competing views of why the ADA Amendments Act of 2008 potentially evolved, it is necessary to consider the response to Court precedent and the changes reflected in the amendments in relation to the original ADA's legislative history.

A. *Responding to the Supreme Court: Changes Through the ADA Amendments Act of 2008*

Among the most significant changes to the original ADA through the ADA Amendments Act of 2008 (ADAAA) was to provide clarification

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58. *Id.* § 2(b).

59. *Id.* § 2(b)(2).

60. 480 U.S. 273 (1987)

61. ADAAA §2(b)(3); *see* Gary Lawson, *AIDS, Astrology, and* Arline*: Towards A Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237, 237 (1989) ("In School Board v. Arline, the Supreme Court held that a school teacher with a history of infectious tuberculosis was an 'individual with handicaps protected by [S]ection 504, and that the determination of whether she was 'otherwise qualified' to teach elementary school required a sound medical assessment of the risks of contagion posed by her condition.") (internal citations omitted).

62. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197-98 (2002) (restricting "major life activities" to those activities which are central to daily living, and holding that for someone to be "substantially limited," the impairment must "prevent[ ] or severely restrict[ ]" them from performing those "major life activities").

63. ADAAA § 2(b)(4).

64. *Id.* § 2(b)(5).

to the definition of "disability."[65] As Congress articulated, "disability" was not to be narrowly defined and instead a "definition . . . shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of the Act."[66]

1. Reconstructing the Test for "Substantially Limits"

In response to its disagreement with the Court's reasoning for creating such a strict line of interpretation of "substantially limits" in *Toyota*, Congress provided instruction in the amendments for statutory construction of this term. The amendments emphasize that the construction of substantially limits "shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."[67] The amendments explicitly state the extent to which an impairment "substantially limits" one major life activity will be sufficient to qualify the individual as disabled, "[a]n impairment that "substantially limits one major life activity need not limit other major life activities in order to be considered a disability."[68]

It would seem if in fact the Court had interpreted the purpose of the ADA as Congress had intended, Congress would feel no need to come in and proscribe specific rules of construction to these terms. The only weight given by the Court to legislative intent or history provides a very technical and limited understanding of congressional intent by suggesting that the numbers provided in the ADA do not add up in terms of the number of people with disabilities Congress may actually have intended to protect. For the Court, it was as if Congress was to foresee every single person it could and would consider as a person who qualified as having a disability and received protection under the ADA.[69] The Court erred on the side of exclusion rather than inclusion that at first blush appears contrary to the very goal of the enactment of civil rights legislation. Furthermore, the Court never dug any deeper into the purposes that Congress specified for the creation and implementation of the ADA. There were no efforts by the Court to point to any of the congressional reports that would provide key insight into legislative history to demonstrate the necessity of enacting the ADA. It appears illogical and unpersuasive in con-

65. *Id.* Sec. 4, § 3(1), 122 Stat. at 3555.

66. *Id.* Sec. 4, § 3(4) (entitled "Rules of Construction Regarding the Definition of Disability").

67. *Id.* Sec. 4, § 3(4)(B).

68. ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, Sec. 4, § 3(4)(C), 122 Stat. 3553, 3556.

69. *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) ("That the Act defines 'disability' 'with respect to an individual' . . . makes clear that Congress intended the existence of a disability to be determined in such a case-by-case manner.")

sideration of the ADA's significance as civil rights legislation that the Court's examination of legislative intent and history was slim if not bare bones.

2. Defining "Major Life Activities"

The ADA Amendments Act of 2008 replaces previous congressional silence with a detailed definition of "major life activities" that outline specific activities deemed applicable in order to satisfy the definition of "disability." These activities "include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "the operation of a major bodily function, including . . . functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[70]

There is no indication by the Court of its use of legislative intent or history in its analysis of "major life activities" in *Toyota*. The Court examined that term combined with defining "substantially limits."[71] In defining "substantially limits," the Court only considered legislative history and congressional intent to the extent of Congress's ability to do a number crunch of how many people it identified as having disabilities.[72] While it can be argued that Congress may have taken greater care to draft more specific definitions of these key terms within the definition of "disability," the Court failed to take account of legislative history of the ADA or congressional intent in any substantial degree in the absence of precise definitions of language that is critical to the law's protections. The list provided by Congress for "major life activities" under the ADAAA does not seem beyond basic logic or common sense to the average person that Congress should be required to spell the activities out in the law. The activities are items that a person engages in on a daily basis. If Congress is subjected to having to define every single term in its legislation for fear that the Court may misinterpret its meaning, Congress may also err by creating laws that are too narrow and do not account for future circumstances. There may have been cases unknown to Congress of individuals equally deserving of the ADA's protections that were at the time of drafting the ADA unknown, but that Congress suspected would later arise i.e. the emergence of new disabilities or conditions. Finally, it could be argued that if Congress does tailor its language with such precision it will usurp the power of the Court by taking away its interpretive

70. ADAAA Sec. 4, §§ 3(2)(A), (B).
71. *Toyota Motor Mfg.*, 534 U.S. at 197–98.
72. *Id.*

function in its role in the judiciary. The foundation of our government's success is dependent on a continual commitment to the principle of separation of powers that creates checks and balances between the branches of government. In drafting the ADA, Congress must also have been mindful of its broader legislative power to make the law rather than causing interference with the judicial branch's primary duty to provide for the law's interpretation.

B. *The Elimination of "Mitigating Measures"*

Among the most pronounced changes to the ADA through the ADA Amendments Act of 2008 was the elimination of the use of "corrective mitigating measures."[73] It is without doubt that Congress had serious disagreement with the Court in this analysis because of the danger that the use of any "corrective measures" would have on jeopardizing the protection of a vast number of people with disabilities. Congress recognized many individuals with disabilities who use accommodations and assistive technologies to at least minimize the difficulties, and challenges posed by living with a disability, or disabilities would potentially lose the protections afforded to them under the ADA if the Court's current analysis continued. This is reflected by Congress's decision to specifically eliminate the consideration of any mitigating measures in determining whether or not an individual has a disability. The ADAAA not only eliminates analysis of mitigating measures in rejection of Supreme Court precedent, but also outlines what is specifically included in mitigating measures that should not be examined. The text reads as follows:

> (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—
>
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or
>
> (IV) learned behavioral or adaptive neurological modifications.[74]

Congress did, however, maintain consideration of "ordinary eyeglasses" as mitigating measures. The amendments provide the following guidance for cases involving the use of assistance for vision:

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73. ADAAA Sec. 4, § 3(4)(E).
74. *Id.*

> (ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
> (iii) As used in this subparagraph—
> (I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
> (II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.[75]

These changes provided in the amendments certainly give significant insight into whether or not Congress originally intended for individuals using mitigating measures to be counted among those benefiting from the ADA's protections.

C. *Dissent in* Sutton *Highlights Court's Disregard for Legislative History & Intent of ADA*

Not every Justice agreed with the Supreme Court's analysis in *Sutton* that led to the inclusion of "corrective measures" in making disability determinations under the ADA. The dissent in *Sutton* reveals both the disregard for legislative history and congressional intent for the original ADA by the Court and demonstrates that this willingness to overlook Congress's goals in enacting this landmark legislation is truly at the heart of the pervasiveness of the narrowing of the law.[76] In the *Sutton* dissent, Justice Stevens and Justice Breyer set out what has been absent in review of this particular case, which surely can be transferred to other cases interpreting the ADA—appropriate attention given by the justices to the legislative history and congressional intent for the ADA as enacted.[77] This is clear first from this dissent's commentary on the number crunching done by Congress in the findings of the original ADA of how many Americans with disabilities the Act protects.[78] This served as a source of argument in both *Toyota* and *Sutton* and led the Court to choose a narrower rather than broader path for the interpretation of the ADA. This is expressed by Justice Stevens in the opening paragraph of the dissent:

> Indeed, by reason of legislative myopia it may not have foreseen that its definition of "disability" might theoretically encompass, not just "some [43 million] Americans," 42 U.S.C. § 12101(a)(1), but perhaps two or three times that number. Nevertheless, if we apply customary

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75. ADAAA Sec. 4, §§ 3(4)(E)(ii) & (iii)(I)–(IV).

76. Sutton v. United Airlines, Inc., 527 U.S. 471, 495-515 (1999) (Stevens, J., dissenting).

77. *Id.* at 495-96.

78. *Id.* at 495.

> tools of statutory construction, it is quite clear that the threshold question whether an individual is "disabled" within the meaning of the Act—and, therefore, is entitled to the basic assurances that the Act affords—focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication. One might reasonably argue that the general rule should not apply to an impairment that merely requires a nearsighted person to wear glasses. But I believe that, in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction.[79]

These words by Justice Stevens demonstrate his recognition that the Court has not appropriately applied "customary tools of statutory construction."[80] Justice Stevens's dissent in interpreting the language of the ADA commences with the notion that when cases involve statutory construction, the Court is to first consider the purposes provided by Congress for the legislation.[81] Unlike the discussion in *Toyota* and *Sutton*, Justice Stevens fleshes out the primary purpose of the ADA as directed expressly by Congress that the "purpose of [the ADA is] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[82] Justice Stevens proceeds by explaining the extent of protection of the ADA in the employment context.[83] He uses an example of a man using a prosthetic leg to illustrate the dangerousness of the utilization of the analysis put forth by the majority in order to emphasize that people who were legitimately intended to be protected by the ADA would not receive such protections.[84] Justice Stevens wrote:

> With the aid of prostheses, coupled with courageous determination and physical therapy, many of these hardy individuals can perform all of their major life activities just as efficiently as an average couch potato. If the Act were just concerned with their present ability to participate in society, many of these individuals' physical impairments would not be viewed as disabilities.[85]

Again returning to the significance of congressional intent, Justice Stevens engaged in a lengthy discussion of the role that legislative history

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79. *Id.*

80. *Id.*

81. *Sutton*, 527 U.S. at 496 (Stevens, J., dissenting).

82. *Id.* at 496–97 (quoting 42 U.S.C. § 12101(b)(1)).

83. *See id.* at 497 (Stevens, J., dissenting) (stating that ADA-covered employers are banned from discriminating against disabled individuals because of their disability).

84. *Id.*

85. *Id.* at 497–98.

must play in statutory construction in the presence of silence by Congress. Justice Stevens expressed these sentiments as follows:

> To the extent that there may be doubt concerning the meaning of the statutory text, ambiguity is easily removed by looking at the legislative history. As then-Justice Renhquist stated . . . "in surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'" The Committee Reports on the bill that became the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures.[86]

Following Justice Rehnquist's acknowledgement as confirmed by U.S. Supreme Court precedent, Justice Stevens provided an in-depth analysis of the Committee Reports in the enactment of the ADA leading him to conclude that the extent to which individuals are to be protected under the ADA includes those individuals using mitigating measures.[87] Of particular interest, he referred to the Senate Committee Report as the ADA originated in the Senate which states: "[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."[88] Additionally, the Report of the House of Representatives regarding the Judiciary echoed the sentiments of the Senate Committee Report, "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."[89] Justice Stevens cited additional reports that all reach the same conclusion—mitigating measures are not to be considered in the determination of disability under the ADA.[90]

Beyond these reports, Justice Stevens highlighted the consistency of regulations created to provide standards to interpreting the ADA as Congress originally constructed it. He wrote:

> In addition, each of the three Executive agencies charged with implementing the Act has consistently interpreted the Act as mandating that the presence of disability turns on an individual's uncorrected state. We have traditionally accorded respect to such views when, as

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86. Sutton v. United Airlines, Inc., 527 U.S. 471, 499 (1999) (Stevens, J., dissenting).
87. *Id.* at 499-503.
88. *Id.* at 499–500 (quoting S.Rep. No. 101-116, p. 23 (1989)).
89. *Id.* at 500 (quoting S.Rep. No. 101-116, p. 23 (1989) (quoting H.R. Rep. No. 101-485, pt. III, p. 28 (1990)).
90. *Id.* at 501.

> here, the agencies "played a pivotal role in setting [the statutory] machinery in motion."[91]

Even in the event that the Court could not adopt the interpretations of the regulations per se, Justice Stevens defended their use as legitimate sources of reference for the Court's statutory construction as evidenced in previous case law.[92]

Finally, Justice Stevens attacked the argument made by the majorities in both *Toyota* and *Sutton* that the 43 million number provided by the findings of the original ADA impacts the extent to which the Court can count individuals as disabled.[93] Justice Stevens pointed to that statistic in relation to the nature of the ADA's commitment to ending discrimination against people with disabilities as a remedial statute similar to other anti-discrimination statutes:

> I think it quite wrong for the Court to confine the coverage of the Act simply because an interpretation of "disability" that adheres to Congress'[s] method of defining the class it intended to benefit may also provide protection for "significantly larger numbers" of individuals, . . . than estimated in the Act's findings. It has long been a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." Congress sought, in enacting the ADA, to "provide a . . . comprehensive national mandate for the discrimination against individuals with disabilities."[94]

What Congress intended through legislative history despite the absence of similar language to this particular issue in the statutory text of the ADA is so clear that it really questions how or why the Supreme Court would have chosen to interpret the law to the contrary. If Justice Stevens's arguments about statutory construction hold true, there are several legitimate reasons why the Court has gotten it wrong in its interpretation of the ADA resulting in congressional action to prevent any future narrowing of the law by the Court.

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91. *Sutton*, 527 U.S. at 501 (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980)).

92. *Id.*

93. *Id.* at 504–05.

94. *Id.* (quoting Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) and 42 U.S.C. § 12101(b)(1)).

D. *Justice Scalia's Commentary on "Textualism" & Statutory Interpretation—Maybe the Supreme Court Got the Original ADA Right?*

One particular Justice currently sitting on the U.S. Supreme Court has had a lot to say about the issue of statutory construction and interpretation. Justice Antonin Scalia has not only written a book on it, but his discourse on the methodology and its significance to Supreme Court jurisprudence has been a source of examination and reflection for those writing on the work of the Supreme Court. The preface to his book, *A Matter of Interpretation*, concisely explains Justice Scalia's view of statutory interpretation: "A government of laws, not of men, means that the unexpressed intent of legislators must not blind citizens. Laws mean what they actually say, not what legislators intended them to say but did not write into the law's text for anyone (and everyone so moved) to read."[95] Justice Scalia's favored methodology for statutory interpretation has been termed "textualism" in which the jurist interprets the law based on the words as provided in the statute's text. However, Justice Scalia is careful to distinguish what his form of textualism embodies—as one not so extreme to rise to the level of strict-construction textualism that prohibits any reasonable interpretation that embraces the intent of the law.[96] Justice Scalia wrote, "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[97] Further, Justice Scalia explained that he sees a textualist as a judge who maintains a moderate position by interpreting neither too strictly nor too broadly, "[b]ut while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[98]

In addition to his views on proper textualism, Justice Scalia has also been critical of the use of both legislative intent and legislative history in statutory interpretation.[99] In discussing statutory construction, Justice Scalia emphasized the irrelevancy and incompatibility of legislative intent in cases in which both the text to a statute is clear and in cases where ambiguity exists.[100] Justice Scalia explains that when a statute is clear, the words of the statute should prevail.[101] Even in cases of ambiguity,

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95. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Guttman ed., 1997).

96. *Id.* at 23.

97. *Id.*

98. *Id.* at 24.

99. *Id.* at 16–17.

100. SCALIA, *supra* note 95, at 16–17.

101. *Id.* at 16. Justice Scalia writes:

Justice Scalia argues that while it is a common assumption in legal thought that legislative intent is the proper statutory construction tool to provide meaning to the statute, this is another myth of the importance and value of legislative intent.[102]

While Justice Scalia's thoughts on legislative intent gives hints to his acceptance of the use of legislative history, a later discussion in his book on legislative history reveals his true feeling. For Justice Scalia, legislative history, like legislative intent, should not have the weight in statutory construction that judges and lawyers tend to give it. This is evidenced by his statement: "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."[103]

Justice Scalia's views on statutory interpretation have not only been the focus of his personal writings, but have found their way into his Supreme Court opinions offering further insight as to the interpretative issues involving the ADA. Recently, in his 2007 dissenting opinion in *Zuni Public School District No. 89 v. Department of Education*,[104] Justice Scalia expressed his disagreement with and criticism of several fellow justices in sidestepping proper statutory interpretation based on the plain meaning of the text as opposed to embracing "judge-supposed legislative intent"

> You will find it frequently said in judicial opinions of my court and others that the judge's objective in interpreting a statute is to give effect to "the intent of the legislature." This principle, in one form or another, goes back at least as far as Blackstone. Unfortunately, it does not square with some of the (few) generally accepted concrete rules of statutory construction. One is the rule that when the text of the statute is clear, that is the end of the matter. Why should that be so, if what the legislature *intended*, rather than what it *said*, is the object of our inquiry? In selecting the words of the statute, the legislature might have misspoken. Why not permit that to be demonstrated from the floor debates? Or indeed, why not accept, as proper for the court to consider, later explanations by the legislators—a sworn affidavit signed by the majority of each house, for example, as to what they *really* meant?

Id. (internal citations omitted).

102. *Id.* at 16–17. In furthering his point Justice Scalia explains that:

> Another accepted rule of construction is that ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute, not only internally consistent, but also compatible with previously enacted laws. We simply assume, for purposes of our search for "intent," that the enacting legislature was aware of all those other laws. Well of course that is a fiction, and if we were really looking for the subjective intent of the enacting legislature we would more likely find it by paying attention to the text (and legislative history) of the new statute in isolation.

Id.

103. *Id.* at 29–30.

104. 550 U.S. 81 (2007).

to arrive at an interpretation.[105] Justice Scalia finds this practice of advancing legislative intent over clear statutory language disturbing for its appearance of judicial activism that allows justices to essentially create the law by *their* determination of what Congress intended.[106] His view is also formulated on the historical basis of the Supreme Court's jurisprudence. The method of statutory construction based on legislative intent over clear statutory language does not hold up in light of Court precedent that has consistently held the starting place of interpretation to be at the exact language contained in the statute.[107] Justice Scalia's dissent in *Zuni* goes to the heart of his disagreement of adopting legislative intent over clear statutory language:

> The very structure of the Court's opinion provides an obvious clue as to what is afoot. The opinion purports to place a premium on the plain text of the Impact Aid statute . . . but it first takes us instead on a roundabout tour of '[c]onsiderations *other* than language,' . . . page after page of unenacted congressional intent and judicially perceived statutory purpose.[108]

In his dissent, Justice Scalia also made the argument that it is incorrect to use legislative intent as an instrument for statutory construction when the Court has not faithfully respected and followed its own jurisprudence of first giving weight to the language of the statute.[109] In *Zuni*, Scalia not only admonished the majority for its willingness to ignore this established practice but suggested that the real intent behind neglecting statutory language is to provide the Court an opportunity to craft policy:

> Nor is this cart–before–the–horse approach justified by the Court's excuse that the statute before us is, after all, a technical one . . . .

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105. Zuni Pub. Sch. Dist. v. Dep't of Educ., 550 U.S. 81, 108 (2007) (Scalia, J. dissenting). In *Zuni*, the Court determined whether the federal Impact Aid Act permits the Secretary of Education "to identify the school districts that should be 'disregard[ed]' by looking at the number of the district's pupils as well as to the size of the district's expenditures per pupil." *Id*. at 84 (majority opinion). The court looked to "the history and purpose of the disregard instruction" in determining that the "Secretary's calculation formula is a reasonable method that carries out Congress's likely intent in enacting the statutory provision." *Id*. at 93. In his dissent, Justice Scalia expresses that "[t]he plain language of the federal Impact Aid statute clearly and unambiguously forecloses the Secretary of Education's preferred methodology for determining whether a State's school-funding system is equalized." *Id*. at 108 (Scalia, J., dissenting). *See* 20 U.S.C. § 7701 (discussing the federal Impact Aid Act).

106. *Zuni Pub. Sch. Dist.*, 550 U.S. at 109-10 (Scalia, J., dissenting).

107. *See id.* at 109 (lamenting that the Court took a round-about way to come to the conclusion that "the statute's plain language does not unambiguously *preclude* the interpretation the Court thinks best").

108. *Id.* at 108. "We must begin as we always do, with the text." *Id*. at 109.

109. *Id.* at 109.

> This Court, charged with interpreting, among other things, the Internal Revenue Code, the Employee Retirement Income Security Act of 1974, and the Clean Air Act, confronts technical language all the time, but we never see fit to pronounce upon what we think Congress *meant* a statute to say, and what we think sound policy would *counsel* it to say, before considering what it *does* say. As almost a majority of today's majority worries, "[w]ere the inversion [of inquiry] to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes." True enough—except I see no reason to wait for the distortion to become systemic before concluding that that is precisely what is happening in the present case. For some, policy-driven interpretation is apparently just fine. But for everyone else, let us return to Statutory Interpretation 101.[110]

This passage by Justice Scalia is significant for another reason. It highlights the categorization of "technical" areas of law, which disability rights legislation would fall into due to its complexities. Justice Scalia would view the ADA no differently than the other "technical" statutes he describes that also must follow the traditional mode of statutory interpretation by attention first to the actual text of the statute. Later in his opinion, Justice Scalia also warns of the dangers of the use of legislative intent by judges because it creates greater opportunities for misinterpretation and guesswork since multiple entities become involved in the process.[111] For Justice Scalia, judges surely cannot have the same level of certainty in basing an interpretive decision on legislative intent as they can by referring to the textual support of the statute. In his eyes he surely favors erring on the side of basing opinions on what is likely to cause the least indecisiveness and potential for error—the text Congress chose to express the protections it wanted that in and of itself should already embody the legislative intent.

Another interesting issue that comes up in Justice Scalia's dissent that relates to the Supreme Court's examination of the ADA is the role that statistics play in making interpretations of the law.[112] Justice Scalia wrote:

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110. *Id.* (internal citations omitted).

111. Zuni Pub. Sch. Dist. v. Dep't of Educ., 550 U.S. 81, 116–17 (2007) (Scalia, J., dissenting).

112. *See generally* Joseph L. Gastworth, *The U.S. Supreme Court Finds a Statute's Description of a Simple Statistical Measure of Relative Disparity* '*Ambiguous*' *Allowing the Secretary of Education to Interpret the Formula:* Zuni Public School District 89 v. U.S. Department of Education II, 7 LAW PROB. & RISK 225 (2008) (analyzing the interpretation of statistics in the *Zuni* decision).

> To understand why, one first must look beyond the smokescreen that the Court lays down with its repeated apologies for inexperience in statistics, and its endless recitation of technical mathematical definitions of the word "percentile." This case is not a scary math problem; it is a straightforward matter of statutory interpretation. And we do not need the Court's hypothetical cadre of number-crunching to guide our way.[113]

For Justice Scalia, this attention to understanding statistics is virtually irrelevant because focus should be placed instead on the statutory text. Again, he reiterated in his dissenting opinion that making an interpretation in the context of defining statistical data has no bearing on interpretation when the statutory text provides the answer:

> The sheer applesauce of this statutory interpretation should be obvious. It is of course true that every student in New Mexico causes an expenditure or produces a revenue that his LEA either enjoys (in the case of revenues) or is responsible for (in the case of expenditures). But it simply defies any semblance of normal English usage to say that every pupil has a "per-pupil expenditure or revenue." The word "per" *connotes* that the expenditure or revenue is a single average figure assigned to a unit the *composite members of which* are individual pupils. And the only such unit mentioned in the statute is the local educational agency. It is simply irrelevant that '[n]o dictionary definition . . . suggests that there is any *single* logical, mathematical, or statistical link between [per-pupil expenditures or revenues] and . . . the nature of the relevant population.' Of course there is not.[114]

Considering the Court's interpretations of the ADA, the Court's examination of the number of individuals with disabilities that Congress stated the ADA was designed to protect is meaningless according to Justice Scalia's analysis because the actual text of the ADA defines the extent of inclusion under the statute by defining the term "disability." There is no need for the Court to engage in a numbers game when words explicitly provide meaning.

Based on the above, Justice Scalia would no doubt find any attempt by the Court to inject its own meaning into a statute like the ADA through legislative intent or history to be futile as the text itself can and should be the primary source for interpretation. For Scalia, whatever statutory text Congress provided for terms like "disability" and "major life activity,"

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113. *Zuni Pub. Sch. Dist.*, 550 U.S. at 111 (Scalia, J., dissenting) (internal citations omitted).

114. *Id.* at 113 (internal citations omitted).

the Court is to rely on the text as stated and should continue to do so until and unless Congress amends the text to reflect a different intention. From Scalia's standpoint, it is not the duty of the Court to get involved in authoring the meaning of the text itself by delving into the legislative intent and history.

IV. The Power to Make Law v. The Power to Interpret Law: What will the ADAAA Mean for Disability?

The debate over the proper interpretation of "disability" under the ADA sheds light on the relationship between two federal institutions and how their relationship can impact public policy. While Congress is charged with the responsibility of creating the law, the U.S. Supreme Court is charged with the responsibility of interpreting the law. This separation of power implements a system of checks-and-balances within the U.S. government in the hope of preventing one branch from usurping excessive authority.

Even though the Court has the power of judicial review, legislative history and congressional intent should still be considered when interpreting the law. Resources used by the Court, however, have often altered its interpretation of the law, which also changes congressional intent and how the law is ultimately applied. As the Supreme Court continues to engage in offering its own interpretation of the law, congressional intent is ignored. Logically, it is appropriate to assume that if Congress leaves less room open for interpretation, courts will have less of an opportunity to engage in interpretation contrary to legislative history and intent. Yet, disability law demonstrates that consistent legislative history and congressional intent continues to offer the Court opportunity to insert its interpretive authority.

Since the passage of the ADAAA in 2008, several notable developments have occurred regarding the ADAAA and the interpretation of "disability." On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) released final regulations to accompany the ADAAA that include the definition of "disability."[115] As stated in the final regulation:

> In enacting the ADA Amendments Act, Congress explicitly stated its expectation that the EEOC would amend its ADA regulations to

115. Regulations to Implement the Equal Employment Provisions of the ADA, as Amended; Final Rule, 76 Fed. Reg. 16978, 16980 (Mar. 25, 2011) (to be codified at 29 C.F.R. § 1630.2(g)), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf. "The term 'actual disability' is used as short-hand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of disability." *Id.*

> reflect the changes made by the statute. These changes necessarily extend as well to the Interpretive Guidance (also known as the Appendix) that was published at the same time as the original ADA regulations and that provides further explanation on how the regulations should be interpreted.[116]

Additionally, the EEOC provided guidance[117] on its final regulations for the ADAAA including the interpretation of disability and a fact sheet.[118]

While case law interpreting the definition of "disability" since the passage of the ADAAA is not substantial at this point, it still provides valuable insight as to the interpretative direction of the courts. Simultaneously, it also raises a significant question regarding the expansion of the amended definition, which was designed to reinstate the original intent of the ADA. In *Hoffman v. Carefirst of Fort Wayne, Inc.*,[119] the Northern District of Indiana ruled that a worker's renal cell carcinoma was a disability under the ADAAA.[120] The employee claimed that his cancer should be considered a disability under the ADA because it served as the basis for his termination. The court's decision states that:

> Hoffman claims he is a qualified individual with a disability under the ADA because his renal cell carcinoma (which was in remission at the time of the alleged termination), constitutes a disability under the recent ADA Amendments, and Advanced Healthcare unlawfully terminated his employment when it failed to offer him a reasonable accommodation. Additionally, Hoffman alleges Advanced Healthcare unlawfully terminated his employment because it regarded him as being disabled.[121]

In examining the question of disability, the court reviewed the history of the ADA and the U.S. Supreme Court decisions leading to the passage of the ADAAA.[122] The court made the following observations regarding

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116. *Id.*

117. *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited Mar. 13, 2012).

118. *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (last visited Mar. 13, 2012).

119. 737 F. Supp. 2d 976 (2010).

120. Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976, 977 (N.D. Ind. 2010). In this case the court reasoned that the employee met the requirements to prove prima a facie case. *Id.*

121. *Id.* at 978.

122. *Id.* at 984. The court goes on to state that Congress expanded the scope of the ADA to give individuals a broader scope of protection. *Id.*

the definition of "disability" under the ADAAA with respect to the consideration of renal cancer in remission:

> Although the ADAAA left the ADA's three-category definition of "disability" intact, significant changes were made to how the categories are to be interpreted. Importantly, the ADAAA clarified that the operation of "major bodily functions," including "functions of the immune system," constitute major life activities under the ADA's first definition of disability. Moreover, the ADAAA very clearly provides that "an impairment that is episodic or [*in remission*] is a disability if it would substantially limit a major life activity when active."[123]

Because the employee's cancer was in remission and not impacting a major life activity allowing the employee to return to work, this case of cancer in remission did not constitute a disability under the ADA.[124] Additionally, the employer argued that the ADA was not meant to provide such a broad umbrella of protection, despite lacking proof through legislative history to substantiate his argument.[125]

To assess whether or not cancer in remission constituted a disability, the court realized that this case was one of first impression under the ADAAA. Even though the court attempted to find case law considering "individuals with cancer in remission" as "disabled," they were unable to do so. This was due to the fact that the ADAAA amendments had been held to be retroactive at the time of the suit, so there was little case law, and Hoffman's case was one of the first "to make it to the summary judgment phase."[126]

The court noted that it must not spend an exhaustive amount of time in determining "disability" as directed by the language of the ADAAA.[127] Further, the court looked to the direct language of the ADAAA in the coverage it provides to those with conditions in remission. They examined his disability status based on language from the ADAAA that identifies cancer in remission as a disability "if it would substantially limit a major life activity."[128] Because cancer would have impacted a major life activity, an individual is not required to show the impact on a major life activity with regard to remission as it is essentially tied to cancer.[129]

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123. *Id.* (quoting 42 U.S.C. § 12102(4)(D)) (internal citations removed).
124. *Id.* at 985.
125. *Hoffman,* 737 F. Supp. 2d at 985.
126. *Id.*
127. *Id.* at 984.
128. *Id.* at 985.
129. *Id.*

Therefore, the court ruled that the employee's renal cancer in remission was protected under the ADA as amended by the ADAAA.[130]

Using similar analysis, the Northern District of Illinois determined that HIV constituted a "disability" under the ADAAA.[131] In *Horgan v. Simmons*,[132] the court examined a challenge by an employee who claimed to have been terminated after his employer learned of his HIV status.[133] Just like the Indiana federal district court, the Illinois court began with the history of the changes to the ADA regarding the definition of "disability" through the passage of the ADAAA.[134] In reaching the decision that HIV status is a disability under the ADA as amended by the ADAAA, the court viewed his status as limiting the major life activity of having a functional immune system.[135] The court believed the EEOC's proposed regulations were consistent with their decision since it lists HIV "as an impairment that will consistently meet the definition of disability."[136]

The employer in this case relied on a Seventh Circuit Court of Appeals case[137] where it had been determined that an employee failed to provide evidence to support a claim that HIV status qualified as a disability under the ADA.[138] The *Simmons* court noted that in *EEOC v. Lee's Log Cabin, Inc.*,[139] the Seventh Circuit distinguished AIDS from HIV status, and the employee had not demonstrated that major life activities were impacted by HIV.[140] The court further concluded that the Seventh Circuit had not recognized HIV status as a disability, and several other courts have ruled that an individual's HIV-positive status constituted a per se disability pursuant to the ADA.[141]

Additionally, it is also important to note that the EEOC will potentially play a significant role in shaping the interpretation of "disability" under the ADAAA with the cases it seeks to bring into the legal sys-

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130. Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976, 985 (N.D. Ind. 2010).

131. Horgan v. Simmons, 704 F. Supp. 2d 814 (N.D. Ill. 2010).

132. 704 F. Supp. 2d 814, 819 (N.D. Ill. 2010).

133. *Horgan*, 704 F. Supp. 2d at 816.

134. *Id.* at 818.

135. *Id.* at 819.

136. *Id.*

137. *See* EEOC v. Lee's Log Cabin, Inc., 546 F.3d 438 (7th Cir. 2008) ("[C]laiming that employer violated the Americans with Disabilities Act (ADA) by refusing to hire applicant because she was human immunodeficiency virus (HIV) positive.").

138. *Horgan*, 704 F. Supp. 2d at 819.

139. 546 F.3d 438 (7th Cir. 2008).

140. *Horgan*, 704 F. Supp. 2d at 819 n.2.

141. *Id.* at 819 n.3.

tem.[142] The EEOC has brought claims that will force courts to wrestle with making decisions on whether certain conditions qualify as a "disability" under the ADAAA including chronic arthritis pain,[143] diabetes, hypertension,[144] and cancer.[145] But perhaps what may become the most controversial attempt at deeming an impairment a disability is the problem of obesity.[146] The following reflection suggests that obesity may become one of the newest disabilities under the ADAAA:

> Obviously, the recent slate of cases brought by the EEOC indicates the agency's desire to pinpoint where courts will draw the line on what is considered a "disability." For example, in *EEOC v. Resources for Human Development*, the EEOC alleges that an employer unlawfully terminated an employee who had a disability, specifically obesity. Will a court consider obesity a "disability" under the new standard? A cursory comparison of her condition to the new "disability" standard reveals that she might have a "disability."[147]

Legal scholars are already suggesting the ease with which a claim for obesity under the ADAAA may occur compared to the original ADA.[148]

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142. Alex H. Glaser, *The Americans with Disabilities Act Amendments Act: Legal Implications and the Effect on Employer-Employee Relationships*, 59 LA. B. J. 94, 95–96 (2011).

143. *See id.* at 96 (commenting on a recent case where the EEOC will have to decide whether arthritis is a disability) (citing EEOC v. Eckerd Corp., No. 10-2816 (N.D. Ga. 2000)).

144. Complaint at 17, EEOC v. Fisher, No. 10-cv-02453-BEL (D. Md. Sept. 7, 2010), 2010 WL 3532168.

145. *See* Glaser, *supra* note 142, at 96 (commenting on a recent case brought by the EEOC on behalf of an employee diagnosed with cancer) (citing EEOC v. IPC Print Servs., No. 10-886 (W.D. Mich. 2010)).

146. *Id.*

147. *Id.*

148. *Id.* Attorney Alex H. Glaser writes:

> To prove that she has a "disability," the employee must prove that she (1) has an impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. Arguably, the employee's obesity is a physical impairment that limits a major life activity. Take, for instance, the life activities of "standing," "bending" and "breathing," all listed in the ADAAA's definition of "major life activities. Her obesity also may constitute a "record of impairment." If the employee had a history of obesity at work, she might have a disability under this prong of the definition. Moreover, she may be "regarded as" having an impairment. Under this definition of "disability," she would only need to show that the employer took an adverse employment action based upon her obesity, regardless of the employer's perception of her physical limitations. Accordingly, the plaintiff in this case might be able to prove that obesity is a "disability." This complaint shows just how expansive the definition of "disability" is under the ADAAA.

Id.

While it has been known that obesity has been previously covered by the original ADA, this has only occurred in certain situations and the new ADAAA has been said to create an opportunity for obesity to become a per se disability:

> Is obesity considered a disability? According to the CDC, cases of obesity continue to rise in the United States. Nevertheless, the courts and the EEOC have long maintained that simple obesity is not a recognized impairment under the Americans with Disabilities Act ("ADA") unless the obesity was the result of physiological impairments. However, recent amendments to the ADA may cause obesity to be reclassified as a disability.[149]

The Centers for Disease Control and Prevention (CDC) report that "[a]bout one-third of U.S. adults (33.8%) are obese."[150] The CDC has also kept track of the prevalence of obesity in adults.[151] It is also known that individuals who are obese will incur greater health care costs.[152] "In 2008, medical costs associated with obesity were estimated at $147 billion; the medical costs paid by third-party payors for people who are obese were $1,429 higher than those of normal weight."[153] Because of this problem, if obesity is covered as a disability under the ADAAA, employers may inevitably be required to shell out greater costs in health care. Unless American citizens reverse course dramatically, half the U.S. population is expected to be obese by the year 2030.[154]

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149. Jennifer Pearson Taylor & Ian P. Hennessey, *Legal Matters: Obesity Definition Set to Expand under the ADA*, E. TENN. MED. NEWS, http://easttnmedicalnews.com/news.php?viewStory=1640 (last visited Mar. 13, 2012).

150. *Data & Statistics: Adult Obesity*, CNTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/adult.html (last updated Feb. 27, 2012).

151. *Id.* The CDC states that:

> No state has met the nation's Healthy People 2010 goal to lower obesity prevalence to 15%. The number of states with an obesity prevalence of 30% or more has increased to [twelve] states in 2010. In 2009, nine states had obesity rates of 30% or more. In 2000, no state had an obesity prevalence of 30% or more.

Id.

152. *Id.*

153. *Id.*

154. Talea Miller, *Obesity Rates Rising Worldwide, Half of U.S. Could Be Obese by 2030*, PBS NEWSHOUR (Aug. 25, 2011), http://www.pbs.org/newshour/rundown/2011/08/obesity-rates-rising-worldwide-us-could-hit-50-by-2030.html. "In the United States, where health officials have termed obesity an epidemic, more than [fifty] percent of the adult population could be obese by 2030 if current trends continue, a team from Columbia University and Harvard University wrote . . . ." *Id.*

V. Conclusion

The latest clash between the Supreme Court and Congress over interpretation of the original ADA brings up many questions about Congress's ability to create the law and choose between conflicting purposes and interests that bleed into the judiciary's role of the U.S. Supreme Court. While public policy is believed to lie primarily in the hands of Congress, this concept is weakened when the Supreme Court is called upon to provide statutory construction that creates rather than interprets the law. This can be dangerous in areas of public policy like disability law where the rights of individuals may be jeopardized at the hands of the judiciary. Incorporating two fundamental safeguards, however, would bolster future public policy positions. Congress should take greater care in identifying the protections it intends to provide, and the U.S. Supreme Court should be more cautious in considering legislative history and congressional intent in providing statutory construction.

Exactly how broadly courts will interpret the definition of "disability" is still unknown; however, if the current judicial trends continue, the "disability" envisioned originally by the ADA may in fact become even broader than originally intended. If courts go so far as to accept obesity generally as a disability, there is no doubt that disability under the ADAAA will become far larger as the number of obese Americans continues to expand significantly. If everyone potentially classified as obese is then labeled as disabled, is the new ADAAA still workable? Or will it set the stage for another battle between Congress and the U.S. Supreme Court over "disability"? The interpretation of "disability" under the ADAAA will perhaps be the next great chapter in both disability law and the inherent tension in our system of checks and balances. However, the potential expansion of "disability" under the ADAAA to include all those considered obese, while not necessarily practical, may suggest something larger—that maybe all of us are "disabled" to some extent. The greatest barrier to achieving an end to discrimination against people with disabilities has been attitudinal. If the discussion of obesity as a disability turns heads and raises questions, then maybe it does so to the benefit of those whom disability law was intended to protect—those with disabilities severe enough to warrant protection, and therefore, accommodation, coming as close to equality as possible.

Expanding the ADAAA to include obesity across the board as a disability may not be sound policy as its implications could be substantial, but the dialogue it may create for disability law could have a lasting impact on recognizing that people with disabilities seek the protections the law creates not as a means of being treated differently or getting a benefit, but because they are human beings who deserve the same opportunities as those without disabilities. The law must make such distinctions of who

is and who is not disabled because the attitudinal barrier has been pervasive and prevented people with disabilities from having opportunities without the existence of legal protections to ensure those opportunities. In a dream world, defining "disability" would not be necessary because our society would naturally take necessary measures to ensure equal opportunity. In reality, another major U.S. Supreme Court case may be required to decide the fate of obesity as a disability under the ADAAA.